Supreme Court, U.S.
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No. 87-283

In The

Supreme Court of the United States

OCTOBER TERM 1987

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JOSEPH G. BUDINICH,

Petitioner,

vs.

BECTON DICKINSON AND COMPANY,

Respondent.

—o—

On Writ of Certiorari to the United States Court of Appeals, Tenth Circuit.

—o—

BRIEF FOR PETITIONER

—o—

Thomas E. Frank
(Counsel of Record)
William S. Finger
FRANK & FINGER, P.C.
P.O. Box 1477
Evergreen, CO 80439
(303) 674-6955
Attorney for Petitioner

December 11, 1987

QUESTION PRESENTED

Whether the Court's holding in *White v. New Hampshire*, 445 U.S. 445 (1982), that an award of attorney's fees under a federal statute is an ancillary part of the proceeding, applies to diversity action cases where state law, like Colorado's, provides that attorney's fees are a substantive part of the relief; or whether State substantive law is controlling because of the principles announced in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

And whether, if *White v. New Hampshire* is controlling, the decision in this case should be considered new law relating to diversity cases and only have prospective application.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 807 F.2d 155 and reprinted beginning at Page 14 of the Petition For Writ of Certiorari ("P.W.C.").

The May 17, 1984 Order of the District Court for the District of Colorado relating to post trial motions which is not reported, is reproduced at P.W.C., Pages 32 through 45. The July 3, 1984 Supplemental Order of the District Court for the District of Colorado relating to post trial motions, which is not reported, is reproduced at P.W.C., Pages 47 through 51. The August 1, 1984 Order of the District Court for the District of Colorado which is also not reported, is reproduced at P.W.C., Pages 53 and 54.

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JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered December 12, 1986. A timely Petition For Rehearing was denied on March 26, 1987 (P.W.C., Page 22).

The Petition For Writ of Certiorari was timely filed on July 14, 1987 after Associate Justice Byron R. White granted a Motion For Extension of Time to file the Petition For Writ of Certiorari. The Petition For Writ of Certiorari was granted by order of this Court on October 13, 1987.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTIONAL AMENDMENT 10. POWERS RESERVED TO THE STATES OR PEOPLE.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

ARTICLE IV, SECTION I. FULL FAITH AND CREDIT.

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

ARTICLE VI. CLAUSE 2 — SUPREME LAW.

> "The Constitution and the laws of the United States which shall be made in pursuance therof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound, thereby, any thing in the Constitution or laws of any State to the Contrary notwithstanding."

ARTICLE I, SECTION 8, CLAUSE 18. ALL NECESSARY AND PROPER LAWS.

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

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STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291. Final decisions of the district court.

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292. Interlocutory decisions.

> (a) The courts of appeals shall have jurisdiction of appeals from:
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order, Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1652. State laws as rule of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply.

28 U.S.C. § 2072. Rules of civil procedure.

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution [USCS Const. Amend. 7].

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

C.R.S. 8-4-114 (1973, Cumm. Supp. 1985). Employee may recover attorney fee.

Whenever it is necessary for an employee to commence a civil action for the recovery or collection of wages and penalties due as provided by sections 8-4-104 and 8-4-105, the judgment in such action shall include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action.

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STATEMENT OF THE CASE

This matter centers on a dispute between the parties relating to commissions for the sale of certain vapor sensing equipment sold to the United States Air Force. The action was originally filed in the District Court in and for the City and County of Denver, State of Colorado. The Defendant, Becton Dickinson removed the action based on diversity jurisdiction pursuant to 28 U.S.C. § 1332.

After the close of discovery, the Defendant Becton Dickinson moved for summary judgment arguing that a company could change its commission schedule at any time and the change was binding on its employees.

Plaintiff argued that the law of the State of Colorado required the company to honor commission terms for all orders received or orders in process. Plaintiff argued that the change was only valid prospectively. Plaintiff's argument was rejected by the United States District Court although being supported by Colorado case law.[1] (Order of May 31, 1983 District Court for the District of Colorado, P.W.C. at Pages 24 through 29. Certain claims were not dismissed, including a claim of fraud and second commission claim. The remaining claims were tried to a jury. The jury was unable to render a verdict and a mistrial was declared. Plaintiff moved for reinstatement of the claims summarily adjudged and the motion was denied. A second trial was held which resulted in Plaintiff's verdict for a second commission claim and a defense verdict for the fraud claim. P.W.C. at Page 31.

Plaintiff filed a Motion for Attorney Fees based on the fact that commission claims are claims for wages. Colorado mandates that attorney fees be included as part of the remedy. Joint Appendix ("J.E.") at Page 29. Additionally, Plaintiff moved for a new trial or amendment of judgment alleging multiple errors both at trial and in pretrial rulings, including the adjudication of the Motion for Summary Judgment. Reproduced in J.E. at Pages 24 through 28.

The Court in a single order granted an award of attorney fees, finding that such fees are not discretionary and must under Colorado law be included in the judgment, but left open the issue of the amount due; denied the Motion for new trial or amendment of judgment; and ordered Plaintiff to submit

1. Colorado case law supporting Plaintiff's position on commissions due includes *Hofer v. Polly Little Realtors, Inc.*, 543 P.2d 114 (Colo. App. 1975) and *Brogan v. Bill Eager Motors, Inc.*, 561 P.2d 377 (Colo. App. 1977). Additionally, the case of *Pittman v. Larson*, 724 Colo. 1379 (Ct. Appls. 1986) cert. denied Sept. 29, 1986 holds that summary judgment of the commission claim was erroneous under Colorado law.

detailed records and explanations to justify the attorney fee request while the matter was held in abeyance (May 17, 1984 order of District Court reproduced in P.W.C. at Pages 33 through 45). This was accomplished through a supplemental filing.

The Court thereafter entered a supplemental order awarding attorney fees (Order of July 3, 1984 of the District Court reproduced in P.W.C. at Pages 47 through 51).

Plaintiff filed an appeal in what he believed to be a timely fashion because the mandatory relief under Colorado law (Notice of Appeal reproduced in J.A. at Page 51.
in J.A. at Page 51.

Immediately after appeal the Defendant moved for summary disposition of the case on jurisdictional grounds relying on The Supreme Court decision of *White v. New Hampshire*, 455 U.S. 445 (1982).

The Court of Appeals required the respective parties to brief the jurisdictional issues before submitting briefs on the merits.

On December 12, 1986 the Tenth Circuit Court of Appeals ruled that it lacked jurisdiction to hear the appeal on the merits. Per Curiam opinion of the Tenth Circuit reproduced in P.W.C. at Pages 14 through 20. The Court of Appeals' decision that it lacked jurisdiction was based on *White*. The Court of Appeals found a need for a uniform and unqualified rule. In so ruling, the Court of Appeals found that Colorado substantive law as determined by Colorado Appellate Courts was irrelevant to its determination.[2] December 12, 1986 per curiam opinion, P.W.C. at Page 18).

2. Colorado's substantive law is that an attorney fee award is not ancillary to the underlying proceeding, but is an inherent part of the claim. *Ortega v. Board of County Commissioners*, 657 P.2d 989 (Colo. App. 1982) *cert denied*; *Ball Corporation v. Loran*, 42 Colo. App. 401, 596 P.2d 412 (Colo. App. 1979); Marietta v. Busto, 691 P.2d 345, 347 (Colo. App. 1984), cert. denied 105 S.Ct. 2024 (1985).

The Court of Appeals then held that the appeal was untimely filed since it was beyond the 30 day period prescribed by the governing federal rule of procedure.

Further, the Court of Appeals rejected Plaintiff's argument for nonretroactive application of the decision.

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SUMMARY OF ARGUMENT

The Court in *White v. New Hampshire*, 455 U.S. 445 (1982) held that attorney fees under a federal statute, 42 U.S.C. § 1988, were collateral and separate to relief on the merits.

Since the decision focused on a federal attorney fee statute, the Court was unrestrained to determine the concept of claim finality for a federal cause of action.

This same freedom is not available when the underlying claim is based in state law and federal jurisdiction arises solely through diversity of citizenship pursuant to 28 U.S.C. § 1332.

Where the federal system exercises its authority pursuant to 28 U.S.C. § 1332 diversity jurisdiction, the mandate of the United States Constitution and 28 U.S.C.§ 1652 governs. The result is that state substantive law controls, whether enacted by the state legislature or determined by the state judiciary. *Erie v. Tompkins*, 304 U.S. 64 (1938).

The single limitation upon the *Erie* principle is where enactment of a Federal Rule of Procedure, pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, controls the field and is deemed procedural, or the rule implicity controls the issue and does not abridge, enlarge or modify and substantive right. *Hanna v. Plumber*, 380 U.S. 460 (1965); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Burlington Northern Railroad Co. v. Woods*, ____ U.S. ____, 55 L.W. 4173 (1987).

Colorado's substantive law relating to statutory attorney fees differs from this Court's pronouncement in *White*. By case law Colorado has established that attorney fees are not collateral or independent to the underlying claim, but are an integral part of the substantive relief. *Marietta v. Busto*, 691 P.2d 345, 347 (Colo. App., 1984), cert. denied, 105 S.Ct. 2024 (1985); *Ortega v. Board of County Comm.*, 657 P.2d 989 (Colo. App., 1982), cert. denied, (Colo. Supreme Ct. 1983); *Ball Corp. v. Loran*, 42 Colo. App. 401, 596 P.2d 412 (Colo. Appl., 1979).

The substantive determination by Colorado, although in conflict with the view of the White Court, is not invalidated by any Federal Rule enacted pursuant to 28 U.S.C. § 2072.

Without such enactment the Erie doctrine must control pursuant to Constitutional and statutory mandate. The federal courts therefore must acknowledge Colorado's sovereign determination of its own law that is clearly established in *Ortega* and *Marietta*.

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ARGUMENT

I. THE APPLICATION OF *WHITE v. NEW HAMPSHIRE* IS LIMITED.

In *White* this Court resolved the issue of whether an attorney fee request pursuant to federal statute was a substantive part of the claim or was collateral to and separate from the merits in chief. The Court at 452-53, Note 14 stated:

> [T]he collateral character of the fee issue established that an outstanding fee question does not bar recognition of a merit judgment as 'final and appealable'.

Although the statement is clear on its face, the statement is premised upon the substantive determination that the attorney fee claim is collateral to the merits. It is implicit in *White* that the claim must be examined utilizing the substantive law of the entity enacting the law.

That examination was simple in *White* since the claim arose from the federal civil rights statutes. The Court had the constitutional and legislative freedom to either interpret prior precedent or establish new precedent pertaining to federal substantive claims.

Nearly all federal circuits have recognized that *White* established broad rules relating to federal claims. See *Schutz v. Crowley*, 802 F.2d 498 at 503 (D.C. Cir., 1986); *Ellender v. Schweiker*, 781 F.2d 314 (2nd Cir., 1986); *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467 (10th Cir., 1985); *McKee v. Bi-State Development Agency*, 801 F.2d 1014 (8th Cir., 1986).[3]

However, the freedom in determining substantive law that the Court exercised in White, supra does not exist relative to a claim founded in state law, that is in the federal forum through diversity jurisdiction. The United States Constitution, Amendment 10 and 28 U.S.C. § 1652, specifically mandates adherence to state substantive law. Erie, supra.

The mandate to apply state substantive law is absolute, unless a federal rule of procedure preempts the field or the federal rule implicitly controls the issues of law. Hanna, supra.; Armco Steel, Burlington Nothern Railroad Co.

The Burlington Northern Court at 4174 stated the test as follows:

> "The initial step is to determine whether when fairly construed, the scope of Federal Rule 38 is 'sufficiently broad' to casue a 'direct collision' with the state law, or implicitly, to 'control the issue' before the Court thereby leaving no room for the operation of trust law. [citations omitted]"

3. The Fifth Circuit and Eleventh Circuit have narrowed the interpretation and not applied it in a situation where the amount of the award was not determined. See *Rodriguez v. Handy*, 802 F.2d 817 at 821 (5th Cir. 1986) citing *Fort v. Roadway Express, Inc.*, 746 F.2d 744 (11th Cir. 1984).

This initial critical step was clearly omitted by the Tenth Circuit in its analysis of this case and is ultimately determinative to the issue presented here.

II. NO FEDERAL RULE OF PROCEDURE EXISTS THAT REQUIRES ATTORNEYS FEES BE TREATED AS A COLLATERAL ISSUE.

An examination of the opinion below by the Tenth Circuit [reproduced at P.W.C. 14 through 20] demonstrates that no federal rule of procedure causes a "direct collision" with state substantive law or "controls the issue." The Tenth Circuit's analysis is contained in one sentence [P.W.C., Page 18]:

> "The specification of the time for filing a notice of appeal from the judgment of a federal district court is clearly a question of federal procedure and as such is governed by federal law."

The statement is accurate, but insufficient. The Rules of Appellate Procedure, Rule 4 governs the time for appeal. Yet all orders are clearly not appealable. Rule 4 must be read in conjunction with 28 U.S.C. § 1291 and 28 U.S.C. § 1292. Since certification for appeal was never entered by the District Court, the issue is whether all aspects of the state claim had been adjudicated on the merits. An examination of the trial court's order (reproduced, P.W.C. at Page 33-45) demonstrates that the Court did not end the litigation, since the attorneys fee question was "held in abeyance" pending completion of a briefing schedule.

No definitive rule of procedure exists which specifies whether or not such an order terminates the litigation. Thus there is no "direct collision." Further, no federal rule implicitly "controls the issue" leaving room for the operation of state law. This is clearly demonstrated by the fact that the

Court had to decide *White*, and specifically determine what federal substantive law would be.

Under these circumstances the Court of Appeals was required to examine and utilize Colorado substantive law, *Erie*.

III. COLORADO SUBSTANTIVE LAW ON ATTORNEYS FEES IS THAT THEY ARE AN INHERENT PART OF THE RELIEF AND NOT COLLATERAL TO THE ACTION.

Colorado substantive law relating to attorneys fees differs from this Court's pronouncement in *White*. By case law Colorado established the principle that attorneys fees are not collateral or independent to the underlying claim, but are an integral part of the substantive relief. *Marietta; Ortega; Ball Corp.* The language of *Marietta* at Page 347 is extremely significant:

> "[T]he court had specifically reserved the issue of recoverability of plaintiff's attorney's fees. Until this matter was determined, the judgment was not final or appealable. *Ortega v. Board of County Comm.*, 657 P.2d 989 (Colo. App., 1982)." (emphasis added)

The decisions in *Ortega* and *Marietta* are the law of Colorado. They stand as clear and unrefuted precedent as to what the law is and was. Colorado law is that an award of attorneys fees is an inherent part of the relief and is not divisible from the underlying cause of action.

It is also noteworthy that both *Ortega* and *Marietta* were decided after the United States Supreme Court decision in *White v. New Hampshire*. The divergence of direction from the United States Supreme Court is intentional and results in the clear and unmistakable conclusion that Colorado law fundamentally and substantively differs from federal substantive law.

Colorado's substantive determination directly impacts on the concept of finality of claim. Under Colorado law a claim is not final and appealable until attorneys fees are fully determined. *Torrez v. Day*, 725 P.2d 1184 (Colo. App., 1986).

Appellant's claim for commissions was therefore not fully adjudicated until the trial court entered its determination on the amount of attorneys fees to be paid.

This interpretation is also reinforced by the intent of the labor law statute in question. In discussing C.R.S. 8-4-114, the Colorado Supreme Court specifically noted that attorneys fees in such cases were part of the remedy afforded to the successful employee as a means of deterring the employer. See *Hartman v. Freedman*, 591 P.2d 1318 (Colo., 1979).

Colorado Revised Statute, 8-4-114 specifically mandates that the judgment include a reasonable attorneys fee and the trial court found that requirement controlling. The District Court states in its May 17, 1984 order (reproduced at P.W.C., Page 40) as follows:

> "The Colorado Court of Appeals has explained that recovery of attorneys fees under C.R.S. 8-4-114 is a matter right..." (Citation omitted)
>
> and
>
> "Therefore, the court finds that plaintiff is entitled to an award of reasonable attorney fees with respect to the recovery of said wages pursuant to C.R.S. 8-4-114"

The District's Court's recognition that attorneys fees were part of the award under Colorado substantive law demonstrates that no final judgment occurred until the attorneys fee question was fully determined.

IV. IF WHITE APPLIES TO DIVERSITY CASES NEW LAW HAS BEEN ESTABLISHED.

In the event that this Court determines that *White* controls diversity claims new law has been established, which should be given only prospective application.

The need for such treatment is apparent since Colorado's law was unambiguous and was followed under the belief that it substantively controlled the diversity proceeding.

Neither this Court nor any Court of Appeals prior to the instant case examined and determined the *Erie* question, vis-a-vis *White*.

Since this Court's holding is clearly determinative as to law, its application should be prospective from the date the decision is rendered.

The rationale and criteria for prospective application are enumerated in *E.E.O.C. v. Gaddes*, 733 F.2d 1373 (10th Cir. 1984). All criteria and rationale are present here.

First, new substantive law or precedent would be established.

Second, Appellant has a meritorious appeal. The likelihood of success is substantial. The entry of summary judgment by the United States District Court below was clearly erroneous. Colorado's law expressly holds that an employer cannot unilaterally change a commission schedule in order to avoid the payment of substantial commissions. *Brogan v. Eager Motors, Inc.*, 561 P.2d 377 (Colo. App., 1977); *Hofer v. Polly Little Realtors, Inc.*, 543 P.2d 114 (Colo. App., 1975). Additionally in *Pittman v. Larson Distrib. Co.*, 724 Colo. 1379 (Ct. App. Colo., 1986) the Colorado Court of Appeals determined that summary adjudication of a dispute, like Appellant's was improper because of factual issues.

Additionally, Colorado law on wrongful discharge has been substantially clarified, since a handbook exception to the terminable at will doctrine has been recognized. *Salami v. Farmers Insurance Co.*, 684 P.2d 264 (Colo. App. 1984).

The third and last criterion is also present. Substantial inequities would occur if the holding was made retroactive. Appellant would be clearly injured. Also, appellants in the Eleventh and Fifth Circuit Court of Appeals would be harmed since those circuits have adopted a minority position relating to the attorneys fee finality issue.

The appropriate treatment is therefore prospective treatment, if Appellant is incorrect on the Erie doctrine.

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CONCLUSION

The United States Court of Appeals for the Tenth Circuit incorrectly determined that it lacked jurisdiction in this proceeding. The Tenth Circuit's failure to recognize that *White* did not automatically apply to a case grounded in the substantive law of a state is fatal under *Erie*.

Furthermore, even assuming arguendo that *White* was deemed controlling, its application to diversity cases is a new standard never previously articulated. As a matter of fundamental fairness the appeal on the merits should be permitted.

WHEREFORE, Petitioner respectfully requests this Honorable Court to enter its order making the Writ final and remand this matter to the Tenth Circuit Court of Appeals mandating a review on the merits of the appeal.

Respectfully submitted,
FRANK & FINGER, P.C.
29025D Lakepoint Center
P.O. Box 1477
Evergreen, CO 80439
(303) 674-6955

BY: Thomas E. Frank
(Counsel of Record)
and William S. Finger
Attorneys for Petitioner

Dated this 11th day of December, 1987.